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Nos. 81-2399, 82-358

IN THE

Supreme Court of the United States
OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, et al.,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, et al.,
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On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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The American Mining Congress, a non-profit corporation of the State of Colorado, acting in its capacity as a trade association composed of (1) producers of most of America's metals, coal and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment and supplies; and (3) engineering and consulting

firms and financial institutions that serve the mining industry, moves the Court for leave to file the accompanying brief as amicus curiae in support of petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The Petitioners, Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company and the United States Nuclear Regulatory Commission and the United States of America have consented through their respective counsel of record to the filing of this Motion and Brief. The Respondent has qualified consent to the issue of psychological health damage only.

The decision of the Court of Appeals for the District of Columbia Circuit if allowed to stand, will have far-reaching effects upon all mine operators.

First, in a comparison of risks outside the nuclear field the dissenting opinion of Circuit Judge Wilkey refers to the average loss of life in coal mining and the state of psychological health after a mine accident and raises the corollary of such incidences with the nuclear power incident before this Court.

Secondly, it is important to put to rest any possibility resulting from this case that there is a continuing obligation incumbent upon the Nuclear Regulatory Commission, or any other governmental entity to reassess the environmental impacts of a licensing decision in light of changed circumstances or information even in the absence of any proposal for further federal action.

In view of the widespread ramifications for the mining industry of the lower court's decision, the American Mining Congress respectfully moves the court to grant it permission to file the attached brief as an amicus curiae in support of the

Petitions filed by Metropolitan Edison Company, et al. (No. 81-2399), and the United States Nuclear Regulatory Commission and the United States of America (No. 82-358).

Respectfully Submitted,

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QUESTION PRESENTED

(1) Whether the National Environmental Policy Act requires the Nuclear Regulatory Commission to consider stress (and accompanying physical symptoms), allegedly induced in persons residing in the vicinity of the Three Mile Island nuclear power facility by the pending proposal to authorize restart of Unit 1 of that facility (the unit not involved in the 1979 accident), in connection with its action upon that proposal, notwithstanding the absence of any causal nexus between the alleged stress and the effects of the proposed action upon the natural environment.

(2) Whether NEPA imposes upon the Nuclear Regulatory Commission a continuing obligation to reassess the environmental impacts of a licensing decision in light of changed circumstances or information even in the absence of any proposal for further federal action. (See footnote 12 of the Petition of the Department of Justice in No. 82-358.)

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BRIEF AMICUS CURIAE OF THE AMERICAN MINING CONGRESS

STATEMENT OF INTEREST

Pursuant to Rule 36.3, the American Mining Congress files this brief as amicus curiae in support of petitioners in No. 81-2399 and 82-358.

Its statement of interest is set forth in the accompanying motion.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 678 F. 2d 222. The orders of the Nuclear Regulatory Commission reviewed by the court of appeals and ancillary opinions are reported at 12 N.R.C. 607 and 14 N.R.C. 593 and reproduced in the Petition for a Writ of Certiorari filed by Metropolitan Edison Co., No. 81-2399, and referenced herein as "Pet. App."

JURISDICTION

The amended judgment of the court of appeals (Pet. App. 103a-104a) was entered (without supporting opinions) on April 2, 1982. A modified version of the amended judgment (Pet. App. 29a-30a) was entered on May 14, 1982, at the time opinions were entered. On June 23, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 20, 1982. On August 12, 1982, the Chief Justice further extended the time for filing such a petition to and including August 30, 1982. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Sections 2, 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4331, and 4332, 4335, (NEPA) are reported at Pet. App. 109a-113a.

STATEMENT OF THE CASE

The American Mining Congress, Amicus Curiae, rather than duplicating printed matter before the court adopts by way of reference the Statement of the Case set forth in the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the United States Nuclear Regulatory Commission and the United States, pp 2-16.

REASONS FOR GRANTING THE PETITION

A writ of certiorari should be granted in this case because the court of appeals' decision is an intrusion into procedural decision making within an agency which exceeds the bounds of reason and the purposes and national policy set forth in the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq.

If allowed to stand, this decision would affect the decision making of every other federal agency involved in regulatory and licensing activities and would require a psychological stress factor to be considered in environmental impact statements ranging from a proposed grazing management program on livestock, big game and wild horses on Bureau of Land Management lands, to a programmatic environmental impact statement for the development of a synthetic fuels industry in a three-state area.

I. The Precedential Effect of the Lower Court's Decision Will Adversely Affect the Mining Industry.

The decision now before this Court has caused great concern among members of the mining industry. The applicability of this decision to situations involving risk in other mining, manufacturing and industrial activities throughout the United States would operate as a significant hinderance on productivity and therefore would adversely affect the domestic well being and national security of the United States.

The dissent raises the question "On the majority's reasoning here..." (footnote 37, Pet. App. 45a), will the Department of Labor's Safety and Health Administration be required to go through NEPA procedures after every mine disaster?

Every mine disaster is traumatic and painful to labor, industry and the general public. Every effort is made to avoid such occurrences. The fact that such events occur, however, does not lead to any requirement for a consideration of

psychological stress in connection with each and every licensing or regulatory proceeding.

The alternatives i.e., the risks involved in whether to mine or not have already been determined. The Mining and Minerals Policy Act of 1970, 84 Stat. 1976, 30 U.S.C. 21a; and National Materials and Minerals Policy, Research and Development Acct of 1980, 94 Stat. 2305, 30 U.S.C. 1601, make abundantly clear that mineral development is a national policy of high priority. There is a need for the materials sought, and Section 2 (42 U.S.C. 4321) of NEPA declares the national policy is to "encourage *productive* and enjoyable harmony between man and his environment;..." (emphasis supplied).

Furthermore, Section 4335 of NEPA specifically provides that the policies and goals of NEPA are *supplementary* to those set forth in existing authorizations of Federal agencies. The Conference Committee of the Congress, in explaining section 4335 said: "The effect of this section,...is to give recognition to the fact that the bill does not repeal existing law." Conf. Rep. No. 91-765, 91st Cong., 1st Sess.

In an apparent attempt to distinguish the nuclear industry from every other risk-prone industry, the lower court said that not all psychological effects rise to the level of psychological health effects. NEPA applies to mental health effects of federal actions, the court said, if sufficiently severe (Pet. App. 16a-17a). The mischief of such a conclusion is readily apparent.

Judge Wilkey stated in his dissent that the extension of NEPA to encompass psychological stress is unwarranted, unprecedented, inconsistent and well designed to delay the development of nuclear power. Carried to its logical conclusion, if the majority decision is allowed to stand, the extension of NEPA would delay the development of mines and mining activities, including the mining of energy-producing minerals (other than those used in nuclear energy) throughout the United States. Such a conclusion is unacceptable as national policy.

The federal permitting requirements and enforcement schemes regulating mining operations that could be affected by the decision of the lower court include the following:

I. Permitting requirements and enforcement schemes pertaining to control of pollutants and harmful emissions under:

A. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. § 7401 *et seq.* (1977)).

B. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. § 1251 *et seq.*

C. Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1956) (codified as amended at 33 U.S.C. § 1251 *et seq.* (1977)).

D. Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 997 (1965) (codified as amended at 42 U.S.C. § 6901 *et seq.* (1980)).

Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 42 U.S.C. § 6901 *et seq.*

E. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. § 9601 *et seq.*

F. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003, 15 U.S.C. § 2601 *et seq.* (1976).

G. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified as amended at 42 U.S.C. § 2011 *et seq.* (1976)).

H. Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021, 42 U.S.C. § 2014 *et seq.*

II. Permitting requirements and enforcement schemes pertaining to mining on public lands under:

A. Mining Law of 1872, *as amended*, ch. 152, § 1, 17 Stat. 91, 30 U.S.C. 21 *et seq.* (1981).

B. Mineral Lands Leasing Act, ch. 85, 41 Stat. 437 (1920) (codified as amended at 30 U.S.C. § S 181 *et seq.* (1981)).

C. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744, 43 U.S.C. § 1701 *et seq.*

D. Combined Hydrocarbon Leasing Act of 1981, Pub. L. No. 97-78, 95 Stat. 1070, 30 U.S.C. § 181 *et seq.*

E. Geothermal Steam Act of 1970, Pub. L. No. 91-581, 84 Stat. 1566, 30 U.S.C. §§ 1001-1025.

Geothermal Energy Act of 1980, Pub. L. No. 96-294, 94 Stat. 763, 30 U.S.C. § 1141 *et seq.*

F. Geothermal Energy Research, Development, and Demonstration Act of 1974, Pub. L. No. 93-410, 88 Stat. 1079, 30 U.S.C. § 1101 *et seq.*

These statutes govern activities such as:

(1) Mining plans

(2) Land exchanges

(3) Land use planning

(4) Mineral, coal, oil, shale, and tar sand leases and

(5) Rights-of-way on, over, and across federal land.

III. Permitting requirements and enforcement schemes under the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447 *30 U.S.C.*, § 1201 *et seq.*.

IV. Plan requirements and enforcement schemes under the

Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*.

V. Rulemaking activities under any statute mentioned in I-IV.

II. If Allowed to Stand the Decision of the Lower Court Should be Limited to Its Facts.

The lower court has gone to great pains to narrow the effect of its decision.

At Pet. App. 13a-14a the court said: "Americans have never before experienced the psychological aftermath of a major accident at a nuclear power plant, one that aroused fears of a nuclear core meltdown and led to mass evacuation..."

At Pet. App. 16a the court said: "We conclude that PANE's allegation—in the wake of a unique and traumatic nuclear accident—"

At Pet. App. 17a the court said: "Three Mile Island is, at least so far, the only event of its kind in the American experience."

For reasons herein set forth, this *Amicus* believes that the decision of the lower court is clearly in error, but if the event, i.e., the 1979 accident (which is not connected to the restart of Unit 1), was a "never before", "unique", "traumatic nuclear accident", and "the only event of its kind in the American experience", then surely the decision of the lower court must be limited to its facts. To do otherwise would create chaos in the permitting and regulating activities of the Federal government at every level.

III. To Require Further Environmental Analysis as a Part of a Licensing Restart Proceeding Would Trivialize NEPA.

The purpose of Congress in enacting NEPA was that federal officials appraise continuously all of their activities not

only in terms of economic or technological considerations, but also with reference to broad environmental concerns. This purpose does not require a never-ending, non-final environmental impact statement or a supplemental EIS for each and every oversight thereafter, once an agency has taken a "hard look" at the environmental consequences initially.[1]

Time, resources and reason must come together in the procedural steps leading to decision making. This Court said in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551: "Common sense also teaches us that the detailed statement of alternatives cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." And cited with approval the Court of Appeals for the District of Columbia in *Natural Resources Defense Council, Inc., et al., v. Morton, et al.*, 458 F. 2d 827, 837-838 (D.C. Cir. 1972): "There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities,..."

The regulations of the Council on Environmental Quality, 40 CFR 1502.9 (1981), require a supplement to an environmental impact statement if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

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1. *Cf. Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F. 2d 1164, 1174 (6th Cir. 1972), and see *A Hard Look at Vermont Yankee, Environmental Law Under Close Scrutiny*, 67 Geo. L. J. 699, 704-705 (1979).

The attempt by the lower court to require a supplemental EIS for each and every exercise of supervisory responsibility over operations and maintenance of a licensed operation would make every ongoing agency action a major federal action and would be as unending and unnecessary as including every conceivable alternative device in an EIS,...a concept already rejected by this Court in *Natural Resources Defense Council, Inc., supra.*

The final environmental impact statement and the extensive safety review already completed in the case at bar met the requirements of 102(2)(C) of NEPA. To require a supplemental environmental impact statement at every stage of NRC's supervisory responsibility not only trivializes NEPA, but makes a mockery of Federal decision making.

CONCLUSION

The lower court has used a unique approach to the NEPA process in an attempt to deter nuclear power. It is unfortunate indeed that the specter of a nuclear debate over the very existence of the nuclear energy industry itself comes before the Court disguised in this manner.

As this Court has so aptly said in *Vermont Yankee:*

> The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. *Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.*
> (435 U.S. 519, 558 (emphasis supplied))

The question of nuclear development was decided legislatively by passage of the Atomic Energy Act, 68 Stat. 919, 42 U.S.C. § 2011 *et seq.* and its successor, the Department of

Energy Organization Act, 91 Stat. 565, 42 U.S.C. 7101, *et seq.* And the question of licensing the plant, including consideration of the environmental factors mandated by NEPA, has already been weighed and decided by the Commission. NEPA should not be used to thwart this national policy. As this Court has said in *U.S.* v. *Scrap,* 412 U.S. 669, 694 (1973): "...NEPA was not intended to repeal by implication any other statute." The same can be said for the requirements imposed upon the Nuclear Regulatory Commission by the majority opinion of the lower court.

The valiant attempt by the lower court to distinguish this decision requiring psychological impact statements under NEPA from all other agency licensing and regulatory requirements (which are major federal actions and therefore cognizable under NEPA) fails. The ripple effect caused by the lower court holding in the case at bar would bring to a standstill all regulatory and licensing requirements and would make NEPA the supreme law and not the supplemental law which it clearly was intended to be.

Amicus urges the Court to grant the Petitions herein and to set the case for briefing and argument on the merits.

Respectfully submitted,

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